

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

WILLIAM A. FOSTER,

Petitioner,

v.

CASE NO. 2:09-CV-214

JUDGE HOLSCHUH

MAGISTRATE JUDGE ABEL

TIM BRUNSMAN, WARDEN,

OPINION AND ORDER

On July 14, 2010, the Magistrate Judge issued a Report and Recommendation recommending that claim five of the instant habeas corpus petition be dismissed, and ordering respondent to provide supplemental briefing regarding the remainder of petitioner's claims and including a copy of the state trial transcript. Petitioner has filed objections to the Magistrate Judge's *Report and Recommendation*. For the reasons that follow, petitioner's objections, Doc. No. 33, are **OVERRULED**.

Petitioner objects to the Magistrate Judge's denial of his request for discovery, motion to expand the record, and request for an evidentiary hearing. Petitioner also objects to the Magistrate Judge's recommendation of dismissal of claim five, in which he asserts that he is actually innocent of the charges against him; however, petitioner also indicates that he did not intend to raise this issue as an independent claim, but as cause for any procedurally defaulted claims. See Objections.

Pursuant to 28 U.S.C. § 636(b), this Court has conducted a *de novo* review. Petitioner's objections are not well taken. As discussed by the Magistrate Judge, it appears from the record that the claims on which petitioner seeks to conduct discovery are procedurally barred from review in these proceedings and that neither petitioner's request for discovery nor his motion to expand the record on those claims are warranted. Further, the record fails to reflect that an evidentiary hearing

or any material not already made a part of the record will be required for resolution of petitioner's claims. See 28 U.S.C. § 2254(e)(2). "Where the record is complete and there is no fact that could be developed that would result in the granting of the writ, an evidentiary hearing is unwarranted." *Cunningham v. Hudson*, 2008 WL 2390777 (N.D. Ohio June 9, 2008), citing *McAdoo v. Elo*, 365 F.3d 487, 500 (6TH Cir. 2004). To the extent that petitioner makes arguments in regard to the merits of habeas corpus claims one through four, the Magistrate Judge has yet to issue any recommendations regarding these claims, and these arguments are premature.

Therefore, petitioner's objections, Doc. No. 33. are **OVERRULED**. The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. Claim five is **DISMISSED**.

IT IS SO ORDERED.

Date: September 10, 2010

/s/ John D. Holschuh
JOHN D. HOLSCHUH
United States District Judge